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In The
Supreme Court of the United States
October Term, 1986

EILEEN BAILEY,
Petitioner,

vs.

GRAND TRUNK LINES NEW ENGLAND,
CANADIAN NATIONAL RAILWAY,
MIDLINE DIVISION, ST. LAWRENCE REGION,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

CLARKE A. GRAVEL, ESQ.*
GRAVEL & SHEA, *Of Counsel*
ROBERT B. HEMLEY, ESQ.
DENNIS R. PEARSON, ESQ.
109 So. Winooski Ave.
P.O. Box 1049
Burlington, VT 05402
(802) 658-0220
Attorneys for Respondent

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

QUESTIONS PRESENTED

1. Was the Court of Appeals for the Second Circuit correct in holding, as has this Court and all other Courts of Appeal to consider the question, that the Foreign Sovereign Immunity Act ("FSIA") is the sole source of subject matter jurisdiction over Defendants covered by the Act?

2. Was the Court of Appeals for the Second Circuit correct in finding no conflict between the express language of the FSIA which mandates a non-jury trial in all cases to which it applies, and the Federal Employers Liability Act ("FELA") which provides for a jury trial only by inference and implication?

3. Was the Court of Appeals for the Second Circuit correct in refusing, on the facts of this case, to reverse the trial court and itself enter judgment for Plaintiff on the issue of liability, in order to give the trial judge as the finder of fact an opportunity to reassess the record in light of the Court of Appeals' discussion and instructions?

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TEXT

1 *Moore's Fed. Practice*, ¶.066[44] 700.180 (1985 ed.) 9

STATEMENT OF THE CASE

The principal legal question raised in this case is the trial court's granting of Defendant Canadian National Railway's ("CN") motion to strike Plaintiff's jury demand pursuant to the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330 and 1602-11 ("FSIA"). The trial judge[1] then proceeded to hear the case without a jury, and entered findings of fact and conclusions of law pursuant to Rule 52, Fed.R.Civ.P. That aspect of the case was affirmed in all respects by the Court of Appeals for the Second Circuit. *Bailey v. Grand Trunk Lines,* 805 F.2d 1097 (2d Cir. 1986); *see* Petition, Appendix A. Before turning to a summary of the facts concerning the derailment and accident which led to the death of Plaintiff's decedent, a brief review follows of the facts regarding the applicability of the FSIA.

CN is a "Crown Corporation" whose shares of stock are wholly owned by the Federal Government of Canada (technically, by Her Majesty the Queen in right of Canada). CN was incorporated in Canada in 1922 pursuant to a Special Act of Parliament passed in 1919, to consolidate and amalgamate several railways then either already owned by the Canadian government or in such dire financial straits that they soon would be. Included among the constituent railways merged into CN in 1922 was the railroad line which runs from a junction on the CN mainline east of Montreal, through Vermont, New Hampshire and Maine to Portland. This line is known in CN's modern

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1. Hon. Franklin S. Billings, Jr., former Chief Justice of the Vermont Supreme Court.

plan of organization as the Berlin Subdivision because its regional station headquarters are in Berlin, N.H. The Berlin Subdivision is operated directly by CN, by CN employees using CN rolling stock—unlike CN's other wholly-owned United States rail operations, principally in the midwest, which are operated as subsidiary companies duly incorporated in various states of the United States under the Grand Trunk Corporation.[2] Plaintiff admitted in the trial court that CN's principal place of business was located in Montreal, Quebec where it maintains its corporate headquarters.

Plaintiff's decedent Jeffrey Bailey ("Bailey") was employed by CN from 1972 through June 1983, as a laborer and machine operator on the Berlin Subdivision.[3] Bailey lived in Island Pond, Vermont and worked out of CN's regional station in Berlin, N.H. On June 3, 1983, Bailey was a co-operator of a brushcutting machine, together with Ronald Reindeau ("Reindeau"), another CN employee. Bailey and Reindeau had been operating this ma-

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2. The terms "Grand Trunk Lines New England," "Midline Division" and "St. Lawrence Region" used by Plaintiff in the caption of this case are historical anachronisms that CN has not used for the Berlin Subdivision for more than 30 years. In any event, the trial court and the court below both found that CN is the only relevant Defendant because it is the only "Defendant" to appear and Plaintiff never moved for default judgment against any others. *See* 805 F.2d at 1100 & fn. 2.

3. Reference is made to the Findings of Fact by the District Court, *see* Petition, Appendix C, at 34a-40a. Although the Court of Appeals disagreed with the trial judge's legal conclusion that the Canadian National Railway was not negligent in two respects discussed *infra*, and vacated and remanded for further proceedings and reconsideration of those two issues, the Court of Appeals did not disturb any of the trial court's specific findings of fact. *See* Petition, Appendix A, at 9a-13a.

chine since it had arrived in the United States in March 1983, after a winter-long overhaul at CN's maintenance facilities in Quebec. The machine remained in good, workable condition during its stay in the United States, except for normal maintenance, and was fully operable on June 3, 1983. Before beginning use of this particular machine in March 1983, Bailey and Reindeau had received 2½ days of instruction and training on the machine from a CN foreman.

The brushcutter was capable of operating either on the rails or on the highway; when used on the rails two sets of hydraulically operated flanged wheels kept the machine aligned on the tracks, while all propulsion, braking and steering was through the rubber wheels in either mode since the rubber wheels would rest on top of the track. However, when in use on the rails the steering had to be locked or made inoperable, and this was accomplished either by an integrated, key-operated device in the machine itself and/or by a mechanical yoke that fit over the steering wheel. Once positioned the mechanical yoke could only be removed manually. On June 3, 1983, Bailey was responsible for the final inspection and set-up of the brushcutter as he was to be its driver that day.

CN had a rule, the precise language of which Plaintiff failed to prove, which required that two men "work together" during any operations involving track machinery such as the brushcutter. When actually using a machine for work the two operators would be physically together in it. However, when simply transporting a track machine to another location this rule had been traditionally interpreted by CN employees to mean that one operator

would drive the machine while the other accompanied and/or preceded him along an adjacent highway to stop at and protect any grade crossings. On June 3, 1983, the brushcutter was being transported from Berlin, N.H. to Island Pont, Vt. to return to Quebec.

Bailey left Berlin around 8:30 a.m. with a clear track to Island Pond; Reindeau drove along N.H. Route 110 which parallels the CN track in that area. Bailey and Reindeau met at the first grade crossing, but not at a second crossing outside Groveton, N.H. Radio contact between them also stopped. Reindeau concluded that Bailey had gotten ahead of him and proceeded to Groveton, and then after waiting there, on to Island Pond. After waiting for about an hour at Island Pond Reindeau and other CN employees commenced a search for Bailey, and finally located him at approximately 12:30 p.m. under the overturned machine about half-way between Berlin and Groveton. After he was located it took approximately 1½ hours to put in place the necessary equipment to extricate him, and it was not until 2:30 p.m. that Bailey arrived at Androscoggin Hospital in Berlin. Little could be done for Bailey at Androscoggin, however, and that evening he was transported by ambulance to the Dartmouth-Hitchcock Medical Center in Hanover, N.H. arriving about 7:00 p.m. Bailey died there on June 7, 1983, principally due to complications from the massive crush injury which he received in the derailment.

The trial court concluded that CN was not negligent in its maintenance of the machine or the track in the area of the accident site, or in its training of Bailey to operate the machine. Because the overwhelming weight of the

evidence showed the track at the site to be well within Federal Railway administration tolerances, and it had been officially inspected only a few weeks prior to the accident, the trial court rejected as "not credible" the entire theory and opinion of Plaintiff's expert witness regarding the dynamics of the accident. *See* Petition, Appendix C, at 40a. Instead the trial court found convincing the opinion of Defendant's expert, who in reconstructing the accident concluded that Bailey must have somehow disengaged the mechanical steering yoke, then manually steered the rubber wheels so that the brushcutter derailed, and then compounded that error by attempting to rerail the machine by driving up onto the track, which instead caused the brushcutter to topple sideways. The machine could have been simply stopped by applying the brakes after the initial derailment, as they were in good working order and the machine was probably traveling no faster than 20 m.p.h.

The trial court also concluded that CN was not negligent in the application of its own rule that employees "work together" in transporting track machinery by the procedure used here and in other similar instances, nor was CN negligent in its search and rescue efforts since those were reasonably diligent under all of the circumstances. Having thus found no basis for liability, the trial court entered judgment for Defendant CN without ever reaching or considering the questions of causation (including the issue whether Bailey himself was a sufficient intervening cause of the accident), Bailey's own contributory negligence, and of course damages. The Court of Appeals for the Second Circuit disagreed with the trial court's evaluation of the safety rule and reasonable search issues, and reversed and remanded for reconsideration of

those two questions only; the court below affirmed as to all other grounds for negligence raised by Plaintiff. *See* 805 F.2d at 1101-03; Petition, Appendix A, at 9a-13a.

ARGUMENT

Plaintiff asks the Court to reach out and decide an issue that is not even squarely presented: a purported conflict between the specific non-jury proscription of the FSIA, and the implied right to a jury trial under the FELA. As the court below noted, *see* 805 F.2d at 1101 fn. 3; Petition, Appendix A, at 7a, there simply is no statutory conflict here, and accordingly the FSIA should be applied unambiguously to the facts of this case.

Plaintiff's attempt to circumvent the clear language of the FSIA by arguing that the right to a jury trial is "elevated to special status under the FELA"—perhaps true all other things being equal, which they are not here—does not create an important federal question begging to be decided. The actual question raised by Plaintiff should be left to another day in a case where it is truly determinative.[4] No Writ of Certiorari should be granted here to

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4. There appears as yet to be no reported federal case in which a specific statutory grant of a jury trial has met with a claim for non-jury treatment under the FSIA. An injured seaman's claim under the Jones Act, which refers to and incorporates the body of negligence law that has grown up around the FELA but which expressly provides for trial by jury, *see* 46 U.S.C. § 688, is probably the clearest situation where such an argument might arise, if the employer or ship owner were a foreign state or one of its agencies or instrumentalities. Again, however, it is best to "leave all this to the future." *Ruggiero v. Compania Peruana de Vapores*, 639 F.2d 872, 876 fn. 8 (2d Cir. 1981) (Friendly, J.). Plaintiff's discussion of and analogy to the Jones Act is thus entirely inapposite.

review the decision below of the Court of Appeals for the Second Circuit.

I. PLAINTIFF WAS NOT ENTITLED TO TRIAL BY JURY IN THE DISTRICT COURT

Plaintiff in this Court has abandoned any claim that the FSIA by its terms, *see* Petition at viii-ix, does not apply to CN (as it clearly does based on the facts outlined above), or that the FSIA does not mandate a non-jury trial in all cases to which it applies. Plaintiff also concedes that the FSIA's proscription of jury trials does not violate the Seventh Amendment to the United States Constitution. All that Plaintiff argues now is that the FELA's admittedly "implied" right to a jury trial ought to supersede the FSIA's clear and express statutory rule of non-jury trials in actions against foreign states and their instrumentalities.

Although not framed as such by Plaintiff, the argument is essentially one grounded in a purported statutory conflict, and hence her argument and its premise fail because there simply is no conflict between the FELA and the FSIA on this point. Congress having spoken clearly and succinctly in one instance, and not at all in the other, there is no riddle to be solved regarding Congress's intent to preclude non-jury trials here. "On its face, the language of the [FISA] is unambiguous." *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, —, 76 L. Ed.2d 81, 89, 103 S.Ct. 1962 (1983).

Plaintiff's attempt to carve out from the FSIA a special exception for FELA actions finds no support in

logic or case law. Every court of appeals to consider the question has found the FSIA to be paramount, no matter what the type of case or nature of the claim. *See Bailey v. Grand Trunk Lines,* 805 F.2d 1097, 1101 (2d Cir. 1986); *Arango v. Guzman Travel Advisors,* 761 F.2d 1527, 1532-33 (11th Cir.), *cert. denied,* — U.S. —, 106 S.Ct. 408, 88 L.Ed.2d 359 (1985); *McKeel v. Islamic Republic of Iran,* 722 F.2d 582 (9th Cir. 1983), *cert. denied,* 469 U.S. 880, 150 S.Ct. 243, 83 L.Ed.2d 182 (1984); *Goar v. Compania Peruana de Vapores,* 688 F.2d 417, 423 (5th Cir. 1982); *Rex v. Cia. Peruana de Vapores,* 660 F.2d 61, 63-64 (3d Cir. 1981), *cert. denied,* 456 U.S. 926, 102 S.Ct. 1971, 72 L.Ed.2d 441 (1982); *Williams v. Shipping Corp. of India,* 653 F.2d 875, 880-81 (4th Cir. 1981), *cert. denied,* 455 U.S. 982, 102 S.Ct. 1490, 71 L.Ed.2d 691 (1982).

Upholding Plaintiff's argument would return the analysis of foreign sovereign immunity claims to the same "case-by-case" basis which Congress sought to eliminate by passage of the FSIA, and would mark the first breach in the "comprehensive set of legal standards" which the FSIA was intended to be in every case. *Verlinden B.V. v. Central Bank of Nigeria, supra* — U.S. at —, 76 L.Ed.2d at 88-89. There is no principled reason why FELA claims should be accorded any special preference or importance over the claim of any other injured party. Since the language of the FSIA is so unambiguously clear on this point, there is no need even to delve into the murky question whether Congress expressly considered the impact of the FSIA on FELA claims. And if any consideration was in fact given, the conclusion reached was most likely that creating a systematic and comprehensive set of rules for resolving foreign sovereign immunity claims was the paramount goal.

Because there is no real statutory conflict here, it is not productive to argue Professor Moore's conclusory statement that if there were such a conflict, then the statute creating the cause of action would always control and supersede the FSIA's proscription of jury trials. *See* 1 *Moore's Fed. Practice*, ¶ 0.66[44], at 700.180 (1985 ed.). Professor Moore cites no authority for such a sweeping conclusion, and in any event it is irrelevant in this case.

Finally, Plaintiff's argument that the FSIA and its proscription of jury trials is not jurisdictional, is directly contrary to this Court's holding in *Verlinden B.V. v. Central Bank of Nigeria, supra*, — U.S. at —, 76 L.Ed.2d at 92 & fns. 19-20, and the many decisions by the courts of appeal on this issue. *See e.g., Ruggiero v. Compania Pervana de Vapores, supra*, 639 F.2d at 875, 876, 878; *Frolova v. U.S.S.R.*, 761 F.2d 370 (7th Cir. 1985) (*per curiam*). But if the FSIA is the sole source of jurisdiction in all cases to which it applies, then Plaintiff's alternative "implied waiver" argument under *Parden v. Terminal Railway*, 377 U.S. 184, 12 L.Ed.2d 233, 84 S.Ct. 1207 (1964) is totally without merit. It matters not what the jurisdictional or immunity analysis might have been absent enactment of the FSIA, which is now clearly controlling; a party's actions, even if deliberate, cannot create subject matter jurisdiction. And in any event *Parden* is irrelevant because CN does not and has never claimed wholesale immunity from liability as the Alabama-owned railroad did in *Parden*. Again, there is no indication that Congress intended railroading to be a silent, unexpressed exception to the otherwise unambiguous language of the FSIA.

II. PLAINTIFF IS NOT ENTITLED TO JUDGMENT AS A MATTER OF LAW ON LIABILITY

The facts and circumstances of this case certainly do not lead to any "inescapable conclusion" about either CN's alleged negligence or its liability for Bailey's injuries. Any conclusions to be drawn are at least in the first instance the province of the trial court having heard the witnesses and seen the exhibits, not an appellate court reviewing a cold record. To be sure Plaintiff is not entitled to judgment on liability as a matter of law where there are so many unresolved questions of causation and contributory negligence which the trial court has not yet even ruled on—let alone its reconsideration of the two negligence issues remanded by the Court of Appeals for further consideration.

For example, the evidence in the district court, apart from demonstrating that Bailey alone was responsible for the accident and derailment, also suggested strongly that even if Reindeau had been there immediately, the lapse of time necessary to extricate Bailey and get significant medical attention—at least 1½ hours for the former, 2 hours for the latter—could well have been fatal in any event because he had already lost all sensation in his legs after the first 45 minutes. The medical experts agreed that the prognosis for a victim of a massive crush injury, after circulation and sensation have been lost, is not good, and that the ensuing complications—which are what ultimately caused Bailey's death—are usually irreversible.

Plaintiff thus cannot complain at all about being given a second opportunity to convince the trial court that CN was somehow negligent, and that any such negligence

played some part in Bailey's injuries and death. To go any further than that would surely invade the proper allocation of functions between the trial and appellate courts.

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CONCLUSION

It is respectfully submitted that the Petition for a Writ of Certiorari should be denied in all respects.

Respectfully submitted,

CLARKE A. GRAVEL, ESQ.*
GRAVEL & SHEA, *Of Counsel*
ROBERT B. HEMLEY, ESQ.
DENNIS R. PEARSON, ESQ.
109 So. Winooski Ave.
P.O. Box 1049
Burlington, VT 05402
(802) 658-0220
Attorneys for Respondent

*Counsel of Record

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